No. 20106

In the

United States Court of Appeals

for the Ninth Circuit

GREAT WESTERN BROADCASTING CORPORATION, d/b/a KXTV,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Supplemental Petition to Review a Supplemental Decision of the National Labor Relations Board

Brief of American Federation of Television and Radio Artists, San Francisco Local; National Association of Broadcast Employees and Technicians, Local 55, Amici Curiae

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AUTHORITIES CITED

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INTEREST OF AMICI CURIAE

Amici Curiae, hereafter called The Unions, were intervenors in Case No. 17,698, the proceeding in which the original decision of the National Labor Relations Board was before this Court upon a petition to review filed by the

present petitioner.[1] The Unions' interest in the present case is the same as their interest in No. 17,698, namely, in presenting their position respecting a complaint issued against them which, although dismissed by the Board, is before the Court upon petitioner's request for an order reversing the dismissal and directing the Board to find the Unions guilty of unfair labor practices.

Although the Unions support the ruling of the Board in dismissing the complaint, their position on the legal issues presented is not identical with that of the Board. The Board on remand, in response to the Court's direction in Case No. 17,698, considered the contention advanced in this Court by the Unions to the effect that their conduct complained of did not constitute threats, coercion or restraint within the prohibition of Section 8(b)(4)(ii)(B) of the Act. The Board, however, rejected the Unions' position on this point, and argues in its brief before the Court (pp. 10-12) that the union activities under consideration are within the foregoing prohibitory language. Further, the Board on remand did not pass on the second question which the Court referred to it for "a determination as to the merits" (Pet. br. App., p. 36), namely, whether "The Union activity involved in this case in protected by the free speech and free press provisions of the First Amendment to the Federal Constitution" (*id.*). Instead, the Board reaffirmed its original dismissal of the complaint on the single ground that the union activity alleged in the complaint is excepted from interdiction under Section 8(b)(4)

1. The Unions filed a motion to intervene in the present proceeding, based principally on the fact that the Court had granted them status as intervenors in Case No. 17,698. Although the motion was unopposed, the Court denied intervention "without prejudice to the filing of briefs amici curiae". This brief is filed pursuant to the Court's allowance as stated in the order on the motion to intervene.

(ii)(B) of the Act by the so-called "publicity proviso" to that provision.[2]

The Unions fully agree with the Board's determination that their activities, as alleged in the complaint, are protected by the proviso to Section 8(b)(4) of the Act. The Unions also advance the two independent grounds in defense to the complaint that were argued by them in Case No. 17,698: (1) Their conduct does not fall within the scope of the "threaten, coerce, or restrain" language of Section 8(b)(4)(ii)(B) of the Act, and (2) in any event their conduct is protected by the First Amendment to the Constitution. Either of these contentions, if accepted, requires affirmance of the Board's dismissal order, irrespective of the ground relied on by the Board.

STATEMENT OF THE CASE

The relevant facts are fully stated in this Court's decision in Case No. 17,698 (310 F.2d 591), are also summarized in the brief of Petitioner and the Board, and need not be repeated here. The issues before the Court, on the basis of the uncontested facts, this Court's original decision, and the Board's Supplemental Decision, are threefold: (1) whether the Unions' consumer boycott activities with

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2. The proviso reads as follows:
"That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

respect to advertisers in connection with its strike against Petitioner are protected by the proviso to Section 8(b)(4) of the Act; (2) whether, assuming a negative answer to the first question, such activities are nonetheless outside the reach of Section 8(b)(4)(ii) of the Act; and (3) whether, assuming a negative answer to both of the forgoing questions, the activities in question are nonetheless within the protection of the First Amendment to the United States Constitution.[3]

The Unions support and adopt the argument of the Board with respect to the first of these questions (Bd.br. pp. 12-20). We reaffirm in this brief our position originally advanced in Case No. 17,698 with respect to the remaining two questions.

ARGUMENT

The Supreme Court's Decision in N.L.R.B. v. Fruit & Vegetable Packers, Local 760, Fully Supports the Dismissal of the Complaint Irrespective of the Proviso to Section 8(b)(4) of the Act

Introductory Statement—The Unions have fully discussed in their brief in Case No. 17,698 the reasons in support of their contentions respecting the scope of Section 8(b)(4)(ii) of the Act and the protection afforded their activities by the Constitution. We respectfully refer the Court to our brief in that case rather than reiterate here the arguments made therein.[4] We limit discussion here to the

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3. Petitioner advances a fourth procedural question in its brief: Whether the Board was foreclosed by the doctrine of "law of the case" from reaffirming its original dismissal of the complaint on the ground specified by it (Pet. br. 15-16). The Board correctly points out in its brief (pp. 20-21) that the doctrine has no application to this case.

4. Copies of the Unions' brief in No. 17,698 were, of course, filed with the Court and served on the parties at the time that case was before the Court. Additional copies will be filed and/or served on request.

application to these questions of the Supreme Court's decision in *N.L.R.B. v. Fruit & Vegetable Packers, Local 760,* 377 U.S. 58, handed down after the Court's decision in No. 17,698. We submit that this decision confirms the position of the Unions in their original brief.

A. THE SUPREME COURT'S DECISION IN THE FRUIT & VEGETABLE PACKERS CASE REQUIRES THAT THE BOARD'S LITERAL READING OF SECTION 8(b)(4)(ii) BE REJECTED.

The Board's original decision in this case treated the question of whether the Unions' conduct constituted threats, coercion and restraint within the meaning of Section 8(b)(4)(ii) of the Act by referring to its earlier ruling in *Lohman Sales Company,* 132 NLRB 901. The Board there reasoned that handbills distributed to the public and requesting a forbearance of trading with retailers who distributed the products involved in a primary strike would "threaten, restrain and coerce" the distributor because of the possibility of economic loss in the event that the public responed sympathetically to the appeal. The logic of the Board's position in this respect is unassailable if, but only if, the "threaten, restrain or coerce" language of Section 8(b)(4)(ii) was intended to be defined in terms of possible economic hardship resulting from a withdrawal of public patronage. The Supreme Court, however, has flatly rejected this approach to interpreting the statutory language.

Thus, the argument was made in the *Fruit Packers* case that picketing at Safeway retail stores to request the public not to purchase Washington State apples, the product involved in the primary labor dispute, constituted threats, coercion and restraint because of the economic hurt which the picketing sought to bring upon Safeway, for the purpose of compelling it to cease doing business with the apple packers against whom a strike was in effect. The argument

was disposed of by the Supreme Court in the following language (377 U.S. at 72-73):

> "We disagree therefore with the Court of Appeals that the test of 'to threaten, coerce, or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss. A violation of Section 8(b)(4)(ii)(B) would not be established, merely because respondents' picketing was effective to reduce Safeway's sales of Washington State apples, even if this led or might lead Safeway to drop the item as a poor seller."

Apparently in recognition of the foregoing, the Board in its Supplemental Decision does not rest its conclusion as to the scope of "threaten, coerce and restrain" on the possible or actual economic impact of the union conduct involved. Rather, the Board applies to the *handbilling* in this case the distinction which the Supreme Court drew in the *Fruit Packers* case with respect to *picketing,* i.e., between picketing which seeks "only to persuade customers not to buy the struck product" and picketing "to persuade customers not to trade at all" with the distributor of the struck product. 377 U.S. 58, at 72. The former was found not to be one of the evils which Congress wished to eliminate; the latter was found to have been outlawed. In short, the Board has equated picketing and handbilling for purposes of applying the "threaten, coerce and restrain" language of the statute, and has found the handbilling in this case to be an unfair labor practice because it was not limited, as it could not be, to products advertised on the struck television station. See Bd's br., pp. 11-12.

The Board's facile rule of equivalence is not in keeping with the sophistication which the *Fruit Packer's* opinion reqnires in construing the words of art which Congress has

ised in Section 8(b(4)(ii). The opinion repeats the Court's dmonition in *N.L.R.B. v. Teamsters Local 639,* 362 U.S. 74, that the words "threaten, coerce and restrain" are not o be applied beyond the "isolated evils" which Congress neant to outlaw. 377 U.S. at 63. If, as the Supreme Court lainly indicated in *Fruit Packers,* evidence in legislative istory of an intent to ban specific conduct as one of the isolated evils" is prerequisite to a determination that the onduct falls within Section 8(b)(4)(ii), there is no escape rom the conclusion that peaceful handbilling is beyond the ale of that provision. As detailed in the *Fruit Packers* pinion, explanations made in the committee reports and by he sponsors of the Senate and House bills do not reflect a egislative feeling that peaceful handbilling constitutes a ractice which should be forbidden. Nor, as the Supreme Court explicitly held in *Fruit Packers,* does the circumtance that the publicity proviso to Section 8(b)(4) was dded in conference following passage of the separate bills how that all economic activity by unions not exempted by he proviso automatically falls within the "threaten, coerce r restrain" language of Section 8(b)(4)(ii). 377 U.S. at 9. The point, rather, is that this language encompasses nly the kind of union conduct which can be shown in the tatute or its legislative history to be one of the 'isolated vils' spelled out by the Congress itself." 377 U.S. at 70. This showing cannot be made with respect to peaceful handilling at establishments of distributors of a struck product, rrespective of whether the handbilling is limited to the roduct or seeks a general refusal to patronize the disributor. It follows that, irrespective of the application of he proviso, the activity of the Unions in the present case annot be found prohibited by Section 8(b)(4)(ii)(B).

B. THE OPINION IN FRUIT PACKERS SUPPORTS THE CONTENTION THAT THE PEACEFUL HANDBILLING IN THIS CASE IS CONSTITUTIONALLY PROTECTED.

Although the Supreme Court did not pass on the constitutional question of whether Congress could validly outlaw peaceful consumer picketing, its opinion in *Fruit Packers* acknowledges that constitutional difficulties would arise from a literal reading of Section 8(b)(4)(ii) of the Act.[5] Thus, the Court explained that caution was essential in applying statutory interdictions to picketing because of the "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63. Similarly, the Court alluded to portions of the legislative history of Section 8(b)(4)(ii) which reflected an intention not to forbid picketing or other communication that falls within "the constitutional right of free speech." 377 U.S. at 68, 69.

The respect which the Supreme Court has paid to the constitutional guarantees in a case involving picketing compels even greater deference in a case involving handbilling. It is scarcely open to question that the "sensitive area of peaceful picketing" is, in constitutional terms, more amenable to legislative restraint than peaceful handbilling.

In sum, the constitutional considerations which are brought to bear where, as here, Congress undertakes to regulate the peaceful distribution of written appeals for public support in a labor dispute have been given full recog-

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5. Mr. Justice Black, reaching a different conclusion in the *Fruit Packers* case on the question of statutory construction, was required to deal with the constitutional question, and expressed the view that peaceful consumer picketing was constitutionally protected. 377 U.S. at 76-80. Mr. Justice Harlan, with whom Mr. Justice Stewart joined, concluded that such picketing could validly be restrained, because "picketing is 'inseparably something more [than] and different from simple communication,'" and because other non-picketing methods of communication are available. 377 U.S. at 93.

ition by the Supreme Court in dealing with Section 8(b) 4)(ii) of the Act. If nonliteral interpretation of the lan- uage of this provision is required to avoid the impact of he First Amendment in a case involving peaceful picketing, t follows that the language cannot constitutionally be ap- lied to enjoin the less coercive activity of distributing andbills.

CONCLUSION

For all of the foregoing reasons, as well as those stated n the Union's brief in Case No. 17,698, it is respectfully ubmitted that the Petition to Review should be denied.

September, 1965

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CERTIFICATE

The undersigned certifies that he has examined the provi- ions of Rules 18 and 19 of this Court, and in his opinion he tendered brief conforms to all requirements.

DUANE B. BEESON